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No. 04-1028

Supreme Court, U.S.
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In the
Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA,
ex rel. BILL LOCKYER, ATTORNEY GENERAL,
Petitioner,

v.

DYNEGY INC., *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, DELAWARE, HAWAII, IDAHO, IOWA, MAINE, MINNESOTA, MISSOURI, MONTANA, NEW HAMPSHIRE, OHIO, OKLAHOMA, OREGON, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

Troy King
Attorney General

Margaret L. Fleming
Assistant Attorney General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorn y General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7300, 353-3738 *

March 16, 2005

(Additional counsel for amici curiae are listed inside the front cover.)

ADDITIONAL COUNSEL

SCOTT J. NORDSTRAND
ACTING ATTORNEY GENERAL
STATE OF ALASKA
P.O. Box 110300
Juneau, AK 99811-0300

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
820 N. French Street
Wilmington, DE 19801

MARK J. BENNETT
ATTORNEY GENERAL
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO
P.O. Box 83720
Boise, ID 83720-0010

TOM MILLER
ATTORNEY GENERAL
STATE OF IOWA
Hoover State Office Bldg.
1305 E. Walnut
Des Moines, IA 50319

G. STEVEN ROWE
ATTORNEY GENERAL
STATE OF MAINE
State House Station 6
Augusta, ME 04333

MIKE HATCH
ATTORNEY GENERAL
STATE OF MINNESOTA
445 Minnesota St.
Suite 102
St. Paul, MN 55101

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL
STATE OF MISSOURI
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
ATTORNEY GENERAL
STATE OF MONTANA
P.O. Box 201401
Helena, MT 59620-1401

KELLY A. AYOTTE
ATTORNEY GENERAL
STATE OF NEW HAMPSHIRE
33 Capitol Street
Concord, NH 03301-6397

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad St.
Columbus, OH 43215-
3428

W.A. DREW EDMONDSON
ATTORNEY GENERAL
STATE OF OKLAHOMA
2300 N. Lincoln Blvd.,
Suite 112
Oklahoma City, OK
73105

HARDY MYERS
ATTORNEY GENERAL
STATE OF OREGON
1162 Court St. N.E.
Salem, OR 97301

PAUL G. SUMMERS
ATTORNEY GENERAL
STATE OF TENNESSEE
500 Charlotte Avenue
Nashville, TN 37243

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
236 State Capitol
Suite 320
Salt Lake City, UT
84114-2320

JUDITH WILLIAMS
JAGDMANN
ATTORNEY GENERAL
COMMONWEALTH OF
VIRGINIA
900 East Main Street
Richmond, VA 23219

ROB MCKENNA
ATTORNEY GENERAL
STATE OF WASHINGTON
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL
STATE OF WEST VIRGINIA
State Capitol, Room 26-E
Charleston, WV 25305

QUESTIONS PRESENTED

1. Whether the California Attorney General's state law enforcement proceedings were improperly removed from state court and adjudicated in federal district court, because *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), compel the conclusion that neither original nor removal jurisdiction may be found in section 825p of the Federal Power Act, 16 U.S.C. Section § 825p, and as the United States Court of Appeals for the Ninth Circuit acknowledged, no other statute authorized the exercise of federal jurisdiction.

2. Even if the district court had jurisdiction, whether the sovereign immunity of the States, as preserved by the Eleventh Amendment to the Constitution, nevertheless barred involuntary removal of these state law enforcement proceedings.

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The States of Alabama, Alaska, Delaware, Hawaii, Idaho, Iowa, Maine, Minnesota, Missouri, Montana, New Hampshire, Ohio, Oklahoma, Oregon, Tennessee, Utah, Washington, and West Virginia and the Commonwealth of Virginia (collectively "the *amici* States") respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.4. The *amici* States submit this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed in this case by the People of the State of California.

INTEREST OF *AMICI CURIAE*

This case presents fundamental issues of jurisdiction and state sovereignty. The *amici* States have a sovereign interest in protecting the physical, environmental, and economic well-being of their citizens, and vindicate that interest by enacting laws and bringing civil actions to enforce those laws in state courts. The *amici* States' interest in protecting their citizens is no less compelling simply because, as here, state-law enforcement proceeding might implicate federal law. Neither do principles of state sovereignty-law hinge on whether a State, compelled to litigate state-law claims in federal court, is formally a plaintiff or defendant. In either instance, the interference with sovereign authority is profound. In each instance, the sovereignty of the States is stripped away and the authority of the States to protect their citizens frustrated.

REASONS FOR GRANTING THE WRIT

During the California energy crisis of 2000-2001, the Respondents allegedly engaged in fraudulent business practices that threatened California residents. Among other things, Respondents are said to have accepted payment for energy reserves that they did not, in fact, hold in reserve, thereby jeopardizing the safety and security of California residents. The California Attorney General brought civil enforcement proceedings in state court alleging the Respondents' fraudulent sale of both electric power and the capacity to generate electric power in violation of state law, namely, California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.

Importantly here, California took great care in pleading its complaint to state causes of action only under state law. Even so, Respondents removed the case to federal district court. The State moved to remand, contending that the federal court lacked jurisdiction over the state-law claims; its motion, however, was denied. On appeal, the Ninth Circuit (i) recharacterized the State's well-pleaded, state-law claims as phantom federal claims, and then (ii) rejected the State's submission that its sovereign immunity barred removal of the state-law claims to federal court over its objection. The Ninth Circuit erred on both counts.

I. The Ninth Circuit's Re-Characterization of California's State-Law Claims Conflicts With This Court's Precedent and, More Generally, With the Constitutional Division of Power Between the States and the Federal Government.

The decision of the Ninth Circuit is in astonishingly stark – and even acknowledged – conflict with the decisions of this Court in *Merrell Dow Pharmaceuticals*

Inc. v. Thompson, 478 U.S. 804 (1986), and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961). Furthermore, because *Merrell Dow* and *Pan American* are deeply rooted in principles of federalism that dictate firm boundaries between federal and state jurisdiction and preserve the sovereign authority of the states to police unlawful conduct within their borders, the Ninth Circuit's decision threatens to upset the delicate balance between state and federal power.

A. The Ninth Circuit's Decision Irreconcilably Conflicts With *Merrell Dow* and *Pan American*.

The Ninth Circuit's decision is directly in the teeth of this Court's decisions in *Merrell Dow* and *Pan American*; that fact alone warrants this Court's intervention. *See* Sup. Ct. R. 10(c).

The rule of law established by this Court in *Merrell Dow* is clear:

> [A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

Merrell Dow, 478 U.S. at 817 (quoting 28 U.S.C. § 1331). Thus, federal question jurisdiction exists (even over a state-law cause of action) when Congress creates a federal cause of action covering the conduct at issue; conversely, federal question jurisdiction does *not* exist where Congress has not done so.

In this case, the Ninth Circuit candidly acknowledged the absence of any "statutorily conferred right of action in federal court" to cover the conduct alleged and recognized *Merrell Dow*'s rule that "[o]rdinarily ... federal

jurisdiction does not lie under 28 U.S.C. § 1331 where there is no right of action conferred by federal statute." 375 F.3d at 841 (citing *Merrell Dow*, 478 U.S. at 817). Nevertheless, the Ninth Circuit felt obliged to disregard *Merrell Dow* in favor of its own earlier decision in *Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998), which had created an exclusive jurisdiction "exception" to *Merrell Dow*'s straightforward rule. 375 F.3d at 843 n.10.

Specifically, in the decision below, the Ninth Circuit considered the following provision of the Federal Power Act:

> The District Courts of the United States ... shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

16 U.S.C. § 825p. The Ninth Circuit found that "*Sparta* establishes ... that [§ 825p's] exclusive jurisdiction provision takes the case outside of the rule of *Merrell Dow*," which, it acknowledged, "otherwise might bar the action." 375 F.3d 841.

The problem, however, is that this Court had held just the opposite in *Pan American* when it considered an essentially identical exclusivity provision of the Natural Gas Act. In *Pan American*, this Court considered the effect of the following language:

> The District Courts of the United States ... shall have exclusive jurisdiction of violations of this [statute] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty

> created by, or to enjoin any violation of, this [statute] or any rule, regulation, or order thereunder.

Pan American, 366 U.S. at 662 (quoting 15 U.S.C. § 717r). In *Pan American*, as in the case below, the plaintiffs had brought suit alleging only causes of action under state law. *Id.* at 657. In *Pan American*, because the prices to be paid for natural gas were determined in accordance with rates filed with the Federal Power Commission, the defendants, like the Respondents here, argued that the Natural Gas Act's exclusive-jurisdiction provision deprived state courts of jurisdiction over the state-law contract claims. *Id.* at 662. Accordingly, the question presented in *Pan American*, like the question presented in this case, was whether language granting "exclusive jurisdiction" to the federal district courts "deprived state courts of jurisdiction" over cases alleging state law causes of action. *Id.*

In *Pan American*, this Court answered no and held that the Natural Gas Act's exclusivity language – language identical to the language found in the Federal Power Act examined by the Ninth Circuit here – was *not* a broad "generator of [federal] jurisdiction" that supplanted 28 U.S.C. § 1331. *Id.* at 664. Instead, this Court determined that the language simply dictated that federal courts be the exclusive venue for any causes of action created under the statute. *Id.* Thus, this Court held, when granting "exclusive jurisdiction" to federal courts, Congress had used the words with reference "only to suits that may be brought in the federal courts." *Id.* (citing *Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255, 259 (1897)).

In this case, the Ninth Circuit misconstrued the Federal Power Act's exclusive-jurisdiction language, finding it to be a "generator of jurisdiction" despite this Court's clear holding to the contrary. Indeed, to its credit,

the Ninth Circuit openly admitted as much, when it candidly acknowledged the conflict with *Merrell Dow* and *Pan American* – but nonetheless noted that it "fe[lt] bound" by its own decision in *Sparta*. 375 F.3d at 843 n.10. Whether or not the Ninth Circuit was bound to privilege its own precedent over *Merrell Dow* and *Pan American*, this Court plainly is not. *Merrell Dow* and *Pan American* control this case, and this Court should so hold.

B. The State Courts Are Competent To Resolve Issues of Federal Law.

A state court does not lose jurisdiction simply because a case presents an issue of federal law. For more than a century, this Court has reiterated that the determination of issues arising under federal law "is not beyond the competency of the state tribunals." *Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255, 259 (1897). Instead, state courts "are presumed competent to resolve federal issues," including preemption issues. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988) (citing *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15-16 (1987), and *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511, 518 (1955)). Thus, "when a state proceeding presents a federal issue, ... the proper course is to seek resolution of that issue by the state court." *Chick Kam Choo*, 486 U.S. at 149-50. Should the state court resolve the issue incorrectly, the aggrieved party has recourse through the state appellate process and may, of course, ultimately seek review by this Court. *See Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285, 290-91 (1922).

Congress has created a limited exception to permit the removal to federal court of cases in which the federal courts would have original jurisdiction. 28 U.S.C. § 1441. In this case, the Ninth Circuit permitted removal from state court without strictly adhering to the requirement of

original federal jurisdiction as explicated in cases like *Merrell Dow* and *Pan American*. By doing so, the Ninth Circuit has, in effect, nullified the presumption of state court competence, creating an exception that wrongly strips the jurisdiction of the state courts.

C. Principles of Federalism Dictate That State and Federal Courts Operate in Separate and Distinct Jurisdictional Spheres.

The division of powers between state and federal sovereigns is a cornerstone of the United States Constitution. James Madison described the principle of "double security" incorporated into the United States Constitution:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the right of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51, pp. 350-51 (J. Cooke ed. 1961).

Under our Constitution, powers of government are balanced between the federal and state governments. The power of the federal government is limited to the specific grants of authority given to it by the people through their Constitution. Any powers of government not specifically granted to the federal government are reserved to the States. The States are free to govern themselves within the boundaries established by the lawful acts of the federal government and the constitutional principles applied to the States through the Fourteenth Amendment.

Fundamental constitutional principles demand proper respect for "the constitutional role of the States as

sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Unlike a simple hierarchy of power, such as that present within a single branch of government, the federal and state governments are "separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." *Ableman v. Booth*, 62 U.S. 506, 516 (1858). Consistent with the division of state and federal powers into separate and distinct spheres, principles of federalism ensure that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Thus, under our Constitution, the States are free to determine that unfair and fraudulent business practices threaten the health and safety of their residents, to pass laws prohibiting such practices, and to institute appropriate enforcement actions in state court.

Here, in the face of *Merrell Dow* and *Pan American*, the Ninth Circuit construed the Federal Power Act's exclusive-jurisdiction language to be a broad "generator of jurisdiction." The Ninth Circuit's broad interpretation results in (i) the displacement of a state law that was expressly designed to protect the health and safety of state residents and (ii) the obstruction of state-initiated law enforcement proceedings – all without proper acknowledgement of the presumption that Congress does not intend to displace State law.

Congress, this Court has said, does not "readily interfere" with the sovereign powers reserved to the States under the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). In determining the potentially preemptive effect of federal legislation, the Court presumes that Congress does not intend to upset the delicate balance of federal and state sovereign power, particularly where the state law concerns subjects traditionally within the police power, such as health and

safety laws. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); *Hillsborough County, Fla., v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). Likewise, in interpreting the scope of federal law, this Court is careful to interpret statutes so as not to effect "substantial change in the balance of federalism unless that is the manifest purpose of the legislation." *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002).

Before this Court will act to "alter the 'usual constitutional balance between the States and the Federal Government,' " it requires a clear statement from Congress. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). The point, of course, is not to burden the legislative process, but to ensure "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 544 (2002).

Congress has been careful to preserve and protect the boundary between state and federal jurisdiction. For example, the Anti-Injunction Act provides that –

> A court of the United States may not grant an injunction to stay proceedings in a State court, except [i] as expressly authorized by Act of Congress, or [ii] where necessary in aid of its jurisdiction, or [iii] to protect or effectuate its judgments.

28 U.S.C. § 2283. As this Court has noted, the Anti-Injunction Act "in part rests on the fundamental constitutional independence of the States and their courts"; accordingly, the Act's exceptions "should not be enlarged by loose statutory construction." *Atlantic Coast*

Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970). In this same vein, this Court has discouraged the federal courts' use of such injunctions when their legality is uncertain, emphasizing that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state court to proceed in an orderly fashion to finally determine the controversy" before it. *Id.* at 297.

Likewise, in creating a procedure for the removal of federal causes of action from state court to federal court, Congress did not manifest an intention to disturb the balance between state and federal jurisdiction. Rather, Congress exercised great care not to intrude into the realm of state sovereignty – twice. First, Congress expressly limited removal under 28 U.S.C. § 1441(a) to those cases over which the federal courts already had subject matter jurisdiction. Second, Congress expressly safeguarded state jurisdiction by mandating the remand to state court if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). Congress thus made clear that there is no such thing as independent federal removal jurisdiction; there is only original jurisdiction under 28 U.S.C. § 1331. *See Franchise Tax Bd. of the State of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 8 (1983).

Determining whether a case is one "arising under the Constitution, laws, or treaties of the United States" within the meaning of § 1331 raises important "issues regarding the interrelation of federal and state authority." *Franchise Tax Board*, 463 U.S. at 8. When jurisdiction is uncertain, there is a "need for careful judgments about the exercise of federal judicial power." *Merrell Dow*, 478 U.S. at 814. In particular, this Court looks to the statutory scheme to see whether Congress has created a federal remedy, thereby generating federal

jurisdiction. *Id.* A "congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.*

By ignoring this Court's precedents – and the foundational principles underlying them – the Ninth Circuit plainly erred. This Court should grant certiorari and set matters straight.

D. The Well-Pleaded Complaint Rule Strikes a Logical Balance Between State and Federal Jurisdiction.

In determining whether a case is one "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, federal courts, of course, look to the "plaintiff's statement of his own claim," not the defendant's answer. *See Franchise Tax Bd.*, 463 U.S. at 10 (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)). This Court has repeatedly held that in order for a plaintiff's complaint to "arise under" federal law, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Id.* at 10-11 (citing *Gully v. First National Bank*, 299 U.S. 109, 112 (1936)).

A practical benefit of the well-pleaded complaint rule is that it minimizes the potential for state-federal conflicts. As this Court has observed, the rule "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts." *Franchise Tax Bd.*, 463 U.S. at 9-10. When "both parties admit that the only question for

decision is raised by a federal preemption defense," the well-pleaded complaint rule protects a state court's jurisdiction of a suit "brought upon a state statute." *Id.* at 12 (citing *Gully*, 299 U.S. at 116.

The well-pleaded complaint rule "makes sense" in cases in which federal law "sets bounds for the operation of state authority." *Id.* at 11. The logic of this Court's well-pleaded complaint rule is easily demonstrated in the context of this case, in which the Respondents assert a defense of federal preemption of state-law causes of action: If a cause of action is *prohibited* by federal law, it cannot also *arise under* the same federal law. Rather, it must be said to arise under state law. Consistent with that logic, this Court has repeatedly held that "a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Pan American*, 366 U.S. at 664 (citing *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908)).

The decision below ignores the insurmountable logic of the well-pleaded complaint rule and substitutes a rule that interferes with the exercise of state judicial, legislative, and executive authority. The writ should be granted and the decision of the Ninth Circuit should be reversed.

II. Whether the Removal Statute Effects an Unconstitutional Abrogation of State Sovereign Immunity Is a Question of First Impression and National Importance.

The States and the federal government are separate and distinct sovereigns under the Constitution, each with its own jurisdictional sphere. As this Court has recently observed,

> For over a century now, we have made clear that the Constitution does not provide for federal

> jurisdiction over suits against nonconsenting States. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669-670 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 726 (2003). There are only two instances where the sovereign States may find themselves litigating claims in federal court. First, of course, States may, through their actions, voluntarily submit to the jurisdiction of the federal courts. *See, e.g., Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906) ("[W]here a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."). Second, Congress may in certain narrowly-circumscribed instances abrogate the States' immunity and subject the States to suit in federal court. *See, e.g., Hibbs*, 538 U.S. at 737. When Congress does so, however, it must first speak with an "unmistakably clear" voice. *Will v. Michigan Department of State Police*, 491 U.S. at 65.

In this case, neither exception to state sovereign immunity obtains. Nevertheless, the State of California, having acted carefully to plead only state-law claims in state court, has now been essentially dragged into federal court over its objection and forced to litigate its state-law claims there. By subjecting the State of California to federal jurisdiction over its objection and without any clear Congressional mandate, the Ninth Circuit has expanded the reach of the federal courts far beyond the constitutional boundary carefully enunciated by this Court.

As the petition itself makes clear (Pet. at 21), the Eighth, Ninth, and Tenth Circuits are now divided on the issue of whether state sovereignty bars removal against unconsenting States. The issue is one that requires national uniformity, and one that implicates important federalism concerns. This Court should grant the writ and resolve the uncertainty that now faces the several States, which must decide whether to bring claims in state court, not knowing whether those claims may be removed over their objections to federal court.

A. The Court Looks Beyond Litigation Formalities To Determine Whether State Sovereignty Prohibits a Suit.

"The preeminent purpose of state sovereign immunity [under the United States Constitution] is to accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002). The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The sovereign immunity that the States enjoy "neither derives from nor is limited by" the text of the Eleventh Amendment, however. *Alden v. Maine*, 527 U.S. 706, 713 (1999).

Because the principle of sovereign immunity "transcends the narrow text of the Amendment itself," *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 688 n.5 (1999), this Court has not limited itself to a textual analysis of the Amendment in order to discern the "usual constitutional balance," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), between state and federal jurisdictional authority.

On the contrary, the Eleventh Amendment stands "not so much for what it says, but for the presupposition ... which it confirms." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779 (1991). Accordingly, since the adoption of the Eleventh Amendment, the Court has given it a generous construction and has expanded both the types of entities entitled to immunity and the types of suits from which those entities are immune, so as to "accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. at 760. *See, e.g., Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (holding that unconsenting states sued by their own citizens are entitled to sovereign immunity); *Edelman v. Jordan*, 415 U.S. 651, 663-667 (1974) (holding that the Eleventh Amendment prohibits suits demanding monetary damages from the state treasury); *Louisiana v. Jumel*, 107 U.S. 711, 720 (1883) (holding that the Eleventh Amendment prohibits suits seeking to enjoin State action).

Furthermore, in determining the scope of state sovereign immunity, the Court has looked beyond the style of the case to determine whether the litigation actually interferes with the role of the State as sovereign. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) ("[T]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading."); *Ex parte New York*, 256 U.S. 490, 500 (1921) (what constitutes "a suit against the State" under the Eleventh Amendment "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record"). Thus, the Court has interpreted the Eleventh Amendment to apply not

only to States, but also to "arms of the state" such as state agencies. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). The Court has also interpreted the Eleventh Amendment to protect States from litigation in their own courts. *Alden v. Maine*, 527 U.S. 706, 713 (1999). Finally, and perhaps most significantly for present purposes, the Court has also interpreted the Eleventh Amendment to prohibit injunctions, including those issued by a federal court against a State acting as a plaintiff in a state court proceeding. *See Missouri v. Fiske*, 290 U.S. 18, 27 (1933).

In *Fiske*, this Court refused to permit a federal court to issue an injunction against a State acting as a plaintiff in a state court proceeding. *Id.* at 27. In so doing, this Court noted that the Eleventh Amendment "is an explicit limitation of the judicial power of the United States" which prohibits intrusion by federal courts into the "forbidden sphere" of state sovereignty. *Id.* at 25. This Court held that a federal court "has no authority to issue process against the state to compel it to subject itself to the court's judgment, whatever the nature of the suit." *Id.* at 28.

In interpreting the boundary of State sovereignty reflected in the Eleventh Amendment, this Court has looked beyond the formality of the actual parties named in the suit and the specific relief sought to discern the cumulative effect of the suit on the State as sovereign. Thus, this Court has considered a suit to be prohibited by the Eleventh Amendment "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 n.11 (1984) (internal citations and quotations omitted).

The adverse effect of forcing the States to litigate state-law claims in federal court is substantial. After removal, a federal district court is empowered to "issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise." 28 U.S.C. § 1447(a). Thus, the federal district court may issue orders against the State-plaintiff that would affect the State treasury, *Edelman v. Jordan*, 415 U.S. 651, 663-667 (1974), such as orders for sanctions under Rules 11 and 37 of the Federal Rules of Civil Procedure. The district court may also use its powers of contempt. In the event the State does not prevail, the district court may assess court costs, including attorneys' fees in appropriate cases. If indeed a federal court "has no authority to issue process against the state to compel it to subject itself to the court's judgment, whatever the nature of the suit," *Fiske*, 290 U.S. at 28, then the exercise of federal removal jurisdiction against unconsenting States violates the States' sovereign immunity.

"The very object and purpose of the 11th Amendment [are] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). The object and purpose of state sovereign immunity are frustrated by requiring States to litigate state-law claims in federal courts without their consent.

A State may, of course, voluntarily consent to federal court jurisdiction. In order to do so, however, a state must either purposefully invoke a federal court's jurisdiction, *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906), or makes a "clear declaration" that it intends to submit itself to a federal court's jurisdiction, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54, 64

(1944). A "clear declaration" must be "express" and "unequivocal" and may not be constructive. *College Sav. Bank*, 527 U.S. at 680 (overruling *Parden v. Terminal Ry. of Alabama Docks Dept.*, 377 U.S. 184 (1964)). The requirement of a "clear declaration" of waiver before a State is deemed to have submitted to the jurisdiction of the federal courts is consistent with this Court's stated intent to "accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. at 760.

In this case, California did nothing to invoke the jurisdiction of the federal court.[1] On the contrary, California did everything it could to stay out of federal court, filing its state-law claims in state court and taking care to observe the well-pleaded complaint rule articulated by this Court. Nevertheless, it now finds itself having been dragged into federal court over its objection.

B. Subjecting States to Federal Jurisdiction Without Their Consent Raises Serious Constitutional Questions and Requires, At the Very Least, a Clear Statement From Congress.

"When Congress chooses to subject the States to federal jurisdiction, it must do so specifically." *Atascadero*, 473 U.S. at 246. Before Congress can abrogate the States' immunity and subject unconsenting States to federal court jurisdiction, "it must make its

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[1] This case is thus distinguishable from those cases in which States have, through their own actions, submitted themselves to the jurisdiction of the federal courts. *See, e.g., Lapides v. Bd. of Regents of the Univ. Sys. of Georgia*, 535 U.S. 613 (2002) (finding state waived its Eleventh Amendment immunity by *voluntarily* invoking the jurisdiction of the federal court by filing *its own* removal petition).

intention to abrogate unmistakably clear in the language of the statute." *Raygor*, 534 U.S. at 541 (internal quotations and citations omitted). The clear statement principle "applies when Congress intends to preempt the historic powers of the States or when it legislates in traditionally sensitive areas that affect the federal balance." *Id.* At 543 (internal quotation marks and citations omitted). "In such cases, the clear statement principle reflects 'an acknowledgement that the States retain substantial sovereign powers under out constitutional scheme, powers with which Congress does not readily interfere.'" *Id.* at 544 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)).

In *Raygor*, this Court considered whether the supplemental jurisdiction statute applied to state-law claims against unconsenting States. Although "nothing in the statute expressly exclude[d] such claims," this Court nevertheless deemed them excluded. When Congress is silent on important issues of state sovereignty, this Court said, the Court "h[as] good reason to rely on a clear statement principle of statutory construction." *Raygor*, 534 U.S. at 543. Relying on its reasoning in *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991), the Court held that a general grant of jurisdiction "does not extend to claims against nonconsenting state defendants." *Raygor*, 534 U.S. at 541-42.

The same reasoning applies in this case. This Court should take the next step in its historical analysis of state sovereignty by holding that, in the absence of a clear statement of Congress to the contrary, a state's constitutionally-based and sovereign interest in litigating its own cases in its own courts must take precedence over general removal statutes. In so doing, this Court will avoid "alter[ing] the 'usual constitutional balance between the States and the Federal Government.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)

(quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

In this case, Congress did not speak with a clear voice indicating its intention to subject the State of California to federal jurisdiction. Nevertheless, the Ninth Circuit reached out beyond its boundary and took jurisdiction over a civil enforcement action brought by the State of California to protect its own residents. Principles of federalism require, at the very least, that federal courts refrain from exercising jurisdiction over civil law enforcement proceedings brought by the States to police conduct within their borders, absent a clear statement from Congress that over-arching constitutional demands justify such interference.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Troy King
Attorney General

Margaret L. Fleming
Assistant Attorney General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7300, 353-3738*

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